Hiew Tai Hong v Kilo Asset Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–1231–05 OF 2013
AZAHAR MOHAMED, MOHAMAD ARIFF AND HAMID SULTAN JJCA
21 JANUARY 2015

Companies and Corporations — Winding up — Filing of affidavits — Petitioner's reply to affidavits opposing petition filed out of time under r 30(2) of the Companies (Winding-Up) Rules 1972 — Petitioner applied under rr 193 and 194 of the Rules to extend time to file, serve and use affidavits in reply — High Court held non-compliance inexcusable and dismissed both application to extend time and petition — Court held unrebutted affidavits in opposition rendered allegations in petition baseless — Whether harshness of r 30(2) must be tempered with rr 193 and 194 — Whether court should have considered current jurisprudence on effect of non-compliance in spirit of O 1A of the Rules of Court 2012 — Whether non-compliance with r 30(2) should not be fatal particularly when petition not founded on failure to pay debt under s 218(1)(e) of the Companies Act 1965 but on unfair/prejudicial conduct of directors under s 218(1)(f) and (i) — Whether latter two provisions involved equitable considerations and highly-contested facts and all relevant affidavit evidence should have been considered

The appellant, who was a director and holder of 30% of the share capital of the respondent, presented a petition to wind up the respondent under s 218(1)(f) and (i) of the Companies Act 1965, namely, on the grounds (a) that the directors of the respondent had acted in the affairs of the company in their own interests rather than in the interests of the company as a whole which appeared to be unfair or unjust to other members; and (b) that it was just and equitable that the respondent be wound up. The other two shareholders of the respondent were Goh Cheng Kee ('Goh'), who held 60% of the shareholding, and Mohd Mokhtar Ismail ('Mokhtar') who held the remaining 10%. The appellant claimed that when he joined the respondent at Goh's bidding he had an agreement with Goh that he would always have permanent representation on the respondent's board and that all business decisions would be jointly taken by both of them. The appellant claimed that Goh subsequently began making unilateral decisions for the respondent without consulting him and his worsening relationship with Goh led to the appellant to offer to sell his shares to Goh at a certain price. Alternatively, the appellant offered to buy Goh's shares at a higher price. The appellant claimed that because Goh did not agree to either of the two options he had no choice but to apply to have the respondent wound up. Goh and Mokhtar respectively filed affidavits to oppose

the winding up petition, disputing the various averments the appellant had made and raising new issues. The appellant filed two affidavits in reply but because his filing of those affidavits were out of the time prescribed under r 30(2) of the Companies (Winding-Up) Rules, 1972, the appellant applied by way of encl 17 pursuant to rr 193 and 194 of the Rules for extension of time to file, serve and use the said affidavits. The High Court held the non-compliance with the r 30(2) time-limit was fatal and dismissed encl 17, ignored the appellant's affidavits in reply and dismissed the petition, holding that since Goh's and Mokhtar's affidavits had not been replied to, their contents stood unchallenged and the respondent had sufficiently shown the allegations in the petition had no basis. The instant appeals were against the dismissal of encl 17 and of the petition.

Held:

(1) It did not appear that the High Court judge had even considered the effects of rr 193 and 194 although those were submitted before him. The Winding-Up Rules had to be read harmoniously and the rigours of r 30 must be tempered with rr 193 and 194. Equally important, the High Court should have considered the current approach to non-compliance with rules of procedure as reflected in O 1A of the Rules of Court 2012 that a 'court or judge shall have regard to the justice of the particular case and not only to the technical non-compliance'. Although the Rules of Court 2012 did not directly apply on the facts, this being a winding up matter, the current jurisprudence on the effects of non-compliance should not have been completely ignored (see para 20).

(2) Rule 194 of the Winding-Up Rules was very clear in that no proceedings under the Act or the Rules would be invalidated by any formal defect or any irregularity, unless the court was of the opinion substantial injustice had been caused ... and that the injustice could not be remedied by any order of court. Rule 194 further provided that the court could, on application made, extend time to do any act under the Winding-Up Rules (see para 21).

(3) The High Court erred in failing to direct its mind to the fact that a petition founded on s 218(1)(f) and (i) stood on a very different footing from a s 218(1)(e) petition (ie where the company was unable to pay its debts) and that in an unfair or prejudicial conduct case where equitable considerations invariably came into play, it would not be possible or advisable for the court to adopt such a rigid approach on non-compliance. In such a case, it was not uncommon for the facts to be highly contested and cross-examination of the deponents allowed. No injustice would have been caused to the respondent had the High Court

allowed the application for extension of time, so that there would have been a proper consideration of all the evidence for justice to be done (see paras 7 & 23).

[Bahasa Malaysia summary

Perayu, merupakan pengarah dan pemegang 30% modal saham responden, mengemukakan petisyen untuk menggulungkan responden di bawah s 218(f) dan (i) Akta Syarikat 1965, iaitu, atas alasan-alasan (a) bahawa pengarah responden telah bertindak dalam hal ehwal syarikat demi kepentingan mereka sendiri daripada kepentingan syarikat secara menyeluruh yang mana dilihat tidak adil dan tidak saksama terhadap ahli-ahli lain; (b) bahawa ia adalah adil dan berekuiti untuk responden digulungkan. Dua pemegang saham responden adalah Goh Cheng Kee ('Goh'), yang memegang 60% saham, dan Mohd Mokhtar Ismail ('Mokhtar') yang memegang baki 10%. Perayu mendakwa bahawa apabila dia menyertai responden atas tawaran Goh dia mempunyai satu perjanjian dengan Goh bahawa dia akan sentiasa mempunyai perwakilan tetap di lembaga responden dan bahawa kesemua keputusan perniagaan akan dibuat secara bersama oleh mereka berdua. Perayu mendakwa bahawa Goh kemudiannya mula membuat keputusan satu pihak untuk responden tanpa berunding dengannya dan perhubungannya yang buruk dengan Goh mengakibatkan perayu menawarkan untuk menjual sahamnya kepada Goh pada harga tertentu. Sebagai alternatif, perayu menawarkan untuk membeli saham Goh pada harga yang lebih tinggi. Perayu mendakwa bahawa kerana Goh tidak bersetuju dengan kedua-dua pilihan, dia tidak mempunyai pilihan tetapi untuk memohon agar responden digulungkan. Goh dan Mokhtar masing-masing memfailkan afidavit untuk membantah petisyen penggulungan tersebut, mempertikaikan pelbagai penegasan yang telah dibuat oleh perayu dan membangkitkan isu-isu baru. Perayu memfailkan dua afidavit jawapan tetapi kerana pemfailannya terhadap afidavit tersebut di luar masa yang ditentukan di bawah k 30(2) Kaedah-Kaedah (Penggulungan) Syarikat 1972, perayu memohon melalui cara lampiran 17 menurut kk 193 dan 194 Kaedah-Kaedah bagi penambahan masa untuk memfailkan, menyerahkan dan menggunakan afidavit tersebut. Mahkamah Tinggi memutuskan ketidakpatuhan terhadap k 30(2) batas waktu adalah fatal dan menolak lampiran 17, mengabaikan afidavit jawapan perayu dan menolak petisyen, memutuskan bahawa oleh kerana afidavit Goh dan Mokhtar tidak dijawab, kandungannya kekal tidak dicabar dan responden telah menunjukkan secukupnya tuduhan di dalam petisyen tidak mempunyai asas. Rayuan ini adalah terhadap penolakan lampiran 17 dan petisyen.

Diputuskan:

(1) Ia tidak kelihatan bahawa hakim Mahkamah Tinggi telah mempertimbangkan kesan kk 193 dan 194 walaupun telah dikemukakan di hadapannya. Kaedah-Kaedah Penggulungan hendaklah

dibaca secara harmoni dan keketatan k 30 hendaklah mengukuhkan kk 193 dan 194. Sama-sama penting, hakim Mahkamah Tinggi sepatutnya mempertimbangkan pendekatan semasa terhadap ketidakpatuhan dengan kaedah prosedur sebagaimana digambarkan dalam A 1A Kaedah-Kaedah Mahkamah 2012 bahawa 'court or judge shall have regard to the justice of the particular case and not only to the technical non-compliance'. Walaupun KKM 2012 tidak secara langsung terpakai pada fakta, ni menjadi perkara penggulungan, perundangan semasa terhadap kesan ketidakpatuhan tidak sepatutnya diabaikan sepenuhnya (lihat perenggan 20).

(2) Kaedah 194 Kaedah-Kaedah Penggulungan ternyata jelas bahawa tidak ada prosiding di bawah Akta atau Kaedah-Kaedah akan menjadi tidak sah oleh apa-apa kecacatan atau luar aturan formal, kecuali mahkamah berpendapat ketidakadilan substansial telah berlaku dan bahawa ketidakadilan itu tidak boleh diremedikan oleh apa-apa perintah mahkamah. Kaedah 194 selanjutnya memperuntukkan bahawa mahkamah boleh, pada permohonan yang dibuat, melanjutkan masa untuk membuat apa-apa tindakan di bawah Kaedah-Kaedah Penggulungan (lihat perenggan 21).

(3) Mahkamah Tinggi terkhilaf kerana gagal untuk mengarahkan mindanya kepada fakta bahawa petisyen diasaskan pada s 218(1)(f) dan (i) berdiri atas pendirian yang berbeza daripada s 218(1)(e) (iaitu yang mana syarikat gagal membayar hutangnya) dan bahawa dalam kes kelakuan yang tidak adil atau memudaratkan di mana pertimbangan saksama perlu dibuat, ia tidak mungkin dapat dilaksanakan atau dinasihatkan untuk mahkamah menerima pakai pendekatan yang ketat pada ketidakpatuhan. Dalam kes seperti itu, ia bukan sesuatu yang luar biasa untuk fakta-fakta yang dihujahkan dan pemeriksaan balas terhadap deponen dibenarkan. Tiada ketidakadilan akan berlaku kepada responden sekiranya Mahkamah Tinggi membenarkan permohonan perlanjutan masa, agar terdapat pertimbangan wajar terhadap kesemua keterangan untuk keadilan dilakukan (lihat perenggan 7 & 23).]

Notes

For a case on filing of affidavit, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1277.

Cases referred to

Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756, CA (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 rr 30, 30(2), 193, 194
Companies Act 1965 s 218(1)(e), (f), (i)
Rules of Court 2012 O 1A

Appeal from: Civil Suit No 28–77–10 of 2012 (High Court, Ipoh)

Ranjit Singh (Faizul Hilmy and Nathan Eliatamby with him) (WV Chan & Roy) for the appellant.
Raam Kumaar (Maizatul Azlinda bt Mohd Ali with him) (KB Tan, Kumar & Partners) for the respondent.

Mohamad Ariff JCA (delivering judgment of the court):

[1] This was an appeal against the decision of the High Court in Ipoh which dismissed the winding up petition in encl 1 against the respondent ('Kilo Asset Sdn Bhd') with costs and further, dismissed the notice of application of the petitioner ('Hiew Tai Hong') for extension of time to file, serve and use the affidavits in reply to the affidavits to oppose the petition in encl 17 with costs for the sum of RM70,000 payable by the petitioner, the appellant in this appeal, to the respondent.

[2] The dismissal of encl 17 led the learned judicial commissioner to then state that the two affidavits to oppose the petition had not been challenged, and therefore there was a sufficient explanation given by the respondent to conclude the allegations in the petition had no merits. In a very short judgment, the learned judicial commissioner applied the settled general principle in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 that a failure to contradict a positive assertion in an affidavit is usually treated as an admission of it by the party who has failed to contradict it.

[3] To quote the learned judicial commissioner in this context:

> Oleh kerana affidavit-affidavit jawapan pempetisyen terhadap affidavit No 1 dan No 2 ini tidak diterima oleh mahkamah (kerana difailkan di luar masa yang ditetapkan oleh statut (Kaedah 30(2) KKPS) melalui permohonan Lampiran 17), pengataan atau dakwaan pempetisyen tinggal sebagai dakwaan semata-mata tanpa disokong oleh bukti yang memuaskan. Dengan adanya penjelasan dari pihak responden melalui affidavit No 1 dan No 2 yang tidak disangkal oleh affidavit pempetisyen (kerana tidak diterima oleh mahkamah kerana difailkan di luar masa yang dibenarkan) maka didapati pengataan-pengataan pempetisyen tiada merit dan tidak berasas.
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> (Rujuk nas kes *Ng Hee Thoong v Public Bank Berhad* ... dan kes *Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors* ...).

[4] In terms of sequence and the affidavits filed, the affidavit in support of the petition of the appellant/petitioner was filed on 24 October 2010. Two affidavits in opposition followed (affirmed by Goh Cheng Kee and Mohd Mokhtar bin Ismail respectively and noted in the judgment of the High Court as affidavit No 1 and affidavit No 2), both filed on 6 December 2012. The petitioner then filed a reply affidavit together with a second affidavit in reply on 7 January 2013. On 14 January 2013, there was another affidavit filed on behalf of the petitioner and this was filed on 14 January 2013 (affidavit affirmed by Soh Siew Yeng). There were five other affidavits in opposition filed for the respondent on 11 and 16 January 2013. When the High Court dismissed encl 17, the High Court merely decided on the basis of three affidavits. Seven other affidavits by the parties were ignored resulting from a non-compliance by the petitioner with procedure.

[5] The particular rule of procedure singled out by the High Court is r 30(2) of the Companies (Winding-Up) Rules 1972:

> (2) Any affidavit in reply to an affidavit in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

[6] On the facts, it evident that the three affidavit in reply were not filed within three days of the service of the two affidavits in opposition.

[7] The winding up petition itself was filed under s 218(1)(f) and (i), namely on the grounds (a) the directors have acted in the affairs of the company in their own interests rather that in the interests of the company as a whole which appears to be unfair or unjust to other members ('unfair conduct' ground) and (b) it is just and equitable that the company be wound up ('just and equitable' ground). This was not an ordinary petition under s 218(1)(e), ie where 'the company is unable to pay its debts'.

[8] On the record, this appeared to be a keenly contested petition between competing shareholders and directors, and had nothing to do with any non-payment of a debt due. The petition itself contain a detailed narration of the events leading to the dispute between the shareholders/directors.

[9] Perusing the petition, the appellant/petitioner is a director and one of the shareholders of the respondent. The petitioner holds 75,000 shares representing 30% of the share capital. Goh Cheng Kee, is the major shareholder holding 150,000 shares representing 60% of the share capital. The remaining 10% of the share capital, comprising of 25,000 shares, belongs to Mr Mohd Mokhtar Ismail.

[10] The respondent is principally engaged in property development. A

[11] The appellant, who claims to have 30 years of experience in the construction and development industry, was persuaded by Goh Cheng Kee to join the respondent to develop a project known as 'Baldwin Business Park' with Intervax Corp Sdn Bhd as the landowner and the respondent as the developer. A joint venture contract was entered into by the respondent and Intervax Corp Sdn Bhd on 14 April 2008 to develop the land in which the profit would be shared on a 77% and 23% basis respectively. It was agreed by the parties that the development would comprise of two phases in which Phase 1 comprises of 36 units and Phase 2 comprises of 42 units and a commercial complex with 1 1/2 storey building thereon. B C

[12] Pursuant to the said joint venture, a supplemental agreement was entered on 12 July 2010 wherein a joint venture company was incorporated named Kilo Intervax Sdn Bhd. The shareholders of this company would be the respondent holding 77% of the paid up share capital and Intervax Corp Sdn Bhd holding 23% of the paid up share capital. However, for the shareholders of the respondent, the profits would be distributed according to the shareholding of the shareholders in the respondent. D E

[13] The appellant claims that there was an agreement between him and Goh Cheng Kee whereby he will always be entitled to permanent representation on the board of the respondent and all business decisions would be taken on equal basis between the two. F

[14] The disputes between these two shareholders is said to have been sparked when Goh Cheng Kee intended to appoint an independent sales team for the project, a decision which was strongly opposed by the appellant. According to the appellant's argument, besides incurring additional expenses to the respondent, the appointment of an independent sales team was not needed as the respondent already had its own sales team. Further, on 18 September 2012, a circular resolution was issued by Goh Cheng Kee which sought to change the respondent's mandate to the bank on signatories to cheques by naming himself as the sole signatory for the respondent's account with Hong Leong Bank Bhd. On top of that, the appellant also avers that business decisions of the respondent have been made by Goh Cheng Kee without even consulting him and thus worsened the relationship between them. G H I

[15] Being aggrieved, the appellant wrote a letter, through his solicitors, to Goh Cheng Kee setting out his grievances with an offer for the sale of his shares to Goh Cheng Kee at the price of RM3,200,000, or for the purchase of the Goh Cheng Kee's shares at RM6,400,000. Goh Cheng Kee negotiated to

purchase the appellant's shares at RM2,029,335 for Phase 2 and informed that Phase 1 would only be distributed after an audit was conducted on the profits of Phase 1. From Goh Cheng Kee's conduct, the appellant alleges Goh Cheng Kee has refused to purchase his shares at the price offered or even sell his shares at the higher price as offered by the appellant, and thus the only recourse for him is to apply to have the respondent wound up.

[16] Relying on s 218(1)(f) and/or s 218(1)(i) of the Companies Act 1965, the appellant filed the petition to wind up the respondent on the grounds stated earlier.

[17] In his affidavit to oppose the appellant's petition, Goh Cheng Kee denied all the appellant's allegations against him. According to him, there was no reason for him to sabotage their own company and he had no problems working with the appellant. Goh Cheng Kee also denied having any agreement whatsoever with the appellant in giving him the permanent representation on the respondent's board. By filing this petition, according to Goh Cheng Kee, the appellant was trying to force him to buy the appellant's shares at the appellant's price. Further, Goh Cheng Kee averred that the appellant has no grounds whatsoever to wind up the respondent which is a healthy, profit-making company. Goh Cheng Kee's averments in his affidavit is supported by the affidavit affirmed by Mohd Mokhtar Ismail.

[18] As earlier indicated, the appellant filed the affidavits in reply to these affidavits respectively, but these were out of time. The appellant then filed a notice of application pursuant to rr 193 and 194 of the Companies (Winding-Up) Rules 1972 for an extension of time to file, serve and use his affidavits and other affidavits filed by him.

[19] As seen above, the learned judicial commissioner found that there was a non-compliance of r 30(2), and dismissed the application for extension of time (encl 17) and dismissed the petition consequently.

[20] It did not appear to us that the learned judicial commissioner even considered the effects of rr 193 and 194, although these were submitted before him as included in the written submission of counsel for the petitioner in the High Court. The Winding-Up Rules, in our opinion, have to be read harmoniously, and the rigours of r 30 must be tempered by rr 193 and 194, and equally important, the High Court should have considered the current approach to non-compliance with rules of procedure, as reflected in O 1A of the Rules of Court 2012 ('the ROC 2012') that a 'court or judge shall have regard to justice of the particular case and not only to the technical non-compliance'. Although the ROC 2012 does not directly apply on the facts, this being a winding up matter, the current jurisprudence on the effects

of non-compliance should not be completely ignored.

[21] Rule 194 of the Winding-Up Rules is very clear on this: '... no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion substantial injustice has been caused ... and that the injustice cannot be remedied by any order of court'. Rule 194 further provided the court can on application made extend time to do any act under these Winding-Up Rules.

[22] In the course of the submissions, counsel for the appellant indicated to us that the High Court's decision was influenced by the line of authorities as reflected by the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756. To start with, this Court of Appeal decision concerns a non-payment of debt in a normal banking scenario. The winding up is not based on minority oppression, prejudicial or unfair conduct or just and equitable winding up. Secondly, and this has been highlighted in subsequent cases, r 193 was not referred to by the Court of Appeal then.

[23] The High Court was, in our opinion, in error when the learned judicial commissioner failed to direct his mind to the fact that a s 218(1)(f) and (i) stands on a very different footing from a s 218(1)(e) petition, and that in an unfair or prejudicial conduct case where equitable considerations invariably would come into play, it will not be possible or advisable for the court to adopt such a rigid approach on non-compliance. In such a case, it is not uncommon for the facts to be highly contested and cross-examination of the deponents allowed. We did not believe any injustice would have been caused to the respondent had the High Court allowed the application for extension of time, so that there will be a proper consideration of all the evidence for justice to be done.

[24] Thus, we were of the unanimous opinion that in respect of Appeal No A-02(IM)-1230–05 of 2013 (in respect of the dismissal of encl 17), this appeal should be allowed as it was in the interest of justice to do so. The judgment of the High Court was set aside and orders in terms of prayers (a) and (b) only of encl 17 were to be entered.

[25] Consequently, in respect of Appeal No A-02(IM)-1231–05 of 2013 (dismissal of the petition), this appeal was also allowed with a further order that the winding up petition be remitted back to the High Court for a full hearing. The judgment of the High Court was set aside.

[26] Costs was ordered to be costs in the cause, with the deposit refunded to the appellant.

A *Order accordingly.*

Reported by Ashok Kumar

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